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*Appearing in Propria Persona*

9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF ARIZONA**

11 In Re Bard IVC Filters Products  
12 Liability Litigation

No. MDL-15-02641-PHX-DGC

13 **REPLY IN SUPPORT OF MOTION OF**  
14 **LAW OFFICES OF BEN C. MARTIN**  
15 **AND MARTIN BAUGHMAN TO STAY**  
16 **DISTRIBUTION PENDING APPEAL**

(Assigned to the Honorable David G.  
Campbell)

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18 The Law Offices of Ben C. Martin and the law firm of Martin Baughman, PLLC  
19 (collectively, “BCM”) respectfully submit this Reply in support of their Motion to Stay  
20 Distribution Pending Appeal.  
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22 The Answering Brief for Joint Appellees filed on April 25, 2022 by Jeffrey A. Lamken,  
23 Esquire of the MoloLamken LLP law firm in the *In re: Roundup* Ninth Circuit appeal pending  
24 at No. 21-16228 (9th Cir.) seeks affirmance of Judge Chhabria’s decision in that case, among  
25 other grounds, on the basis that an MDL court lacks the power to assess fees against never filed  
26 cases and cases pending only in state court, regardless of whether the plaintiff’s counsel in such  
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1 cases did or did not sign a participation agreement. Moreover, the holdbacks at issue in this  
2 Court's ruling affect the recovery of clients in unfilled and state court cases, and it is undisputed  
3 that those clients did not themselves agree in any binding manner that the recoveries in their  
4 cases would be subject to this Court's authority or jurisdiction. Thus, the Common Benefit Fees  
5 and Costs Committee (CBFCC) is incorrect when it argues that the Ninth Circuit's forthcoming  
6 decision in the *In re: Roundup* appeal could not compel the reversal of this Court's decision  
7 that is the subject of BCM's appeal.  
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10 As BCM's Motion to Stay Distribution Pending Appeal explained, the challenged  
11 assessments constitute a *res* over which this Court possesses jurisdiction. This Court should  
12 avoid the irreparable destruction of that *res* by distributing it to dozens of law firms from whom  
13 its recovery would be unnecessarily expensive, difficult if not impossible to achieve, and  
14 unnecessarily wasteful of judicial resources in numerous different forums simply because those  
15 law firms would rather have their share of BCM's disputed assessments in their own coffers  
16 sooner rather than later or, depending on the outcome of BCM's appeal, not at all. What is at  
17 issue here is not money that would otherwise belong to BCM but rather to the clients in those  
18 cases. And it would be the clients in those cases who would need to bear the expense of trying  
19 to recover the improper assessments if BCM prevails on appeal but the assessments have  
20 already been distributed to numerous other law firms. The CBFCC's response in opposition  
21 entirely overlooks the harms from attempting to recover those assessments that permitting  
22 distribution now would inflict on those injured claimants over whom this Court never possessed  
23 jurisdiction should BCM prevail on appeal.  
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1 Similarly unpersuasive is the CBFCC's argument that staying distribution of the  
2 contested assessments would somehow reveal otherwise confidential settlement amounts in  
3 individual cases. The data that BCM has provided to this Court under seal will enable this Court  
4 to enter an order directing the CBFCC in the aggregate what total amount of disputed  
5 assessments to hold back. That total amount would not permit the CBFCC or anyone else to  
6 employ "reverse mathematics" (*see* CBFCC's br. at 3) to determine the settlement amounts  
7 achieved by any of BCM's individual clients whose assessments are being challenged on  
8 appeal.  
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11 The insubstantial nature of the CBFCC's opposition to BCM's stay request is  
12 highlighted by the CBFCC's decision to request, as affirmative relief in its response, either the  
13 imposition of a costs bond against BCM or the escrowing of not only the assessment amounts  
14 at issue but also BCM's share of fees and costs in the cases that are the subject of the appeal.  
15 These attempts to punish BCM for pursuing its appellate rights are without legal merit.  
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18 In *Azizian v. Federated Dept. Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007), the Ninth  
19 Circuit considered those rare circumstances when a costs bond pursuant to Fed. R. App. P. 7  
20 can include security for the appellee's counsel fees. The Ninth Circuit concluded that counsel  
21 fees can only be included where "an applicable fee-shifting statute includes them in its  
22 definition of recoverable costs, and only if the appellee is eligible to recover such fees." *Azizian*,  
23 499 F.3d at 953. Yet the CBFCC has failed to identify any such fee shifting statute that is  
24 applicable here. Although the CBFCC cites to an Arizona statute providing that "[i]n any  
25 contested action arising out of a contract, express or implied, the court may award the  
26 successful party reasonable attorney fees," (*see* CBFCC's br. at 5, citing Ariz. Rev. Stat. §12-  
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1 341.01(A)), this matter does not arise out of a contract, and is certainly not a breach of contract  
2 dispute, but rather concerns whether this Court has the power, independent of any applicable  
3 Participation Agreement, to assess fees and costs against parties to suits that were never  
4 pending in or before this Court.  
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6 The CBFCC also suggests, without citing any actual evidence, that law firms entitled to  
7 share in the distribution of the disputed fee and costs assessments would suffer supposed  
8 economic hardships if they were required to await the outcome of BCM's Ninth Circuit appeal.  
9 See CBFCC's br. at 4. Even if this Court were to indulge the possibility that these distributions  
10 were needed to enable those otherwise seemingly very successful law firms to meet their  
11 ordinary business obligations, which again no evidence exists to establish, that hypothetical  
12 harm pales in comparison to the harm that BCM's affected clients would suffer if the fee  
13 distributions were made now and then, down the road, BCM wins its Ninth Circuit appeal,  
14 leaving no readily available, segregated proceeds from which those clients could recover the  
15 disputed fee and costs assessments.  
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19 Nor is escrowing BCM's fees and costs from the cases at issue necessary or appropriate  
20 either to "protect the confidential nature of the settlements" or to "create a corpus from which  
21 any award of attorneys' fees to replenish the common benefit fees depleted by MB's litigation  
22 and appeal." CBFCC's br. at 6. As explained above, the stay that BCM is seeking, if granted,  
23 would not imperil the confidential nature of the settlements because it would in no way reveal  
24 the settlement amounts of individual cases. Rather, this Court would merely be ordering the  
25 CBFCC to continue to hold in escrow a total, aggregate amount of fee and costs assessments.  
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27 Thus, escrowing BCM's fees and costs in these cases is not necessary to achieve  
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1 confidentiality. And the CBFCC has failed to demonstrate any legal entitlement to recover from  
2 BCM its fees and costs in opposing the relief that is now the subject of BCM's Ninth Circuit  
3 appeal even were the CBFCC to prevail in achieving affirmance, or that such fees and costs  
4 would total anywhere near the amount that the CBFCC is asking this Court to place in escrow,  
5 representing the entirety of BCM's fees and costs for representing clients who never filed a  
6 claim or sued in state court.  
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9 BCM recognizes that any request for a stay pending appeal puts a district court in the  
10 uncomfortable position of having to assess the correctness of a decision that the district court  
11 inevitably thought was correct or else it would have reached the opposite result. But, as BCM  
12 has demonstrated, between the appeal that BCM has taken in this case and the appeal that the  
13 common benefit committee has taken in the *In re: Roundup* case, the Ninth Circuit will  
14 inevitably be determining the extent to which an MDL court can or cannot lawfully impose fee  
15 and costs assessments against unfiled cases and cases pending in state court. The only way to  
16 ensure the existence of the relief that BCM's clients would be entitled to if BCM prevails in its  
17 appeal is for this Court to enter a stay now precluding the distribution of the fee and costs  
18 assessments at issue until after the Ninth Circuit rules. That is reason enough to grant the  
19 requested stay.  
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23 For these reasons, and the reasons set forth in BCM's opening brief, this Court should  
24 grant a stay of distribution of the contested funds pending appeal.  
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1 RESPECTFULLY SUBMITTED this 27th day of June 2022.

2 **MARTIN | BAUGHMAN, PLLC**

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12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on this 27th day of June, 2022, I electronically transmitted  
14 the attached document to the Clerk's Office using the CM/ECF System for filing and  
15 transmittal of a Notice of Electronic Filing.  
16

17 /s/ Ben C. Martin  
18 Ben C. Martin  
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